

STATE OF TENNESSEE

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Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
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October 27, 2003

Honorable Deborah Taylor Tate
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

IN RE: MATTER PENDING AT THE TRA, DOCKET NO. 03-00442, SPRINT
UNITED TARIFF 2003-710 TO INTRODUCE SAFE AND SOUND II SOLUTION

Dear Chairman Tate:

Enclosed is an original and thirteen copies of the Consumer Advocate and Protection Division's Reply Brief in the matter referenced above. Kindly file same in this docket. Copies are being sent to all parties of record. If you have any questions, kindly contact me at (615) 741-8733. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Vance L. Broemel".

Vance L. Broemel
Assistant Attorney General

cc: All Parties of Record

#66649

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**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)	
)	
SPRINT UNITED TARIFF 2003-710 TO)	DOCKET NO. 03-00442
INTRODUCE SAFE AND SOUND II)	
SOLUTION)	

CONSUMER ADVOCATE'S REPLY BRIEF

Comes now Paul G. Summers, the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to the directives of the Tennessee Regulatory Authority ("TRA"), and hereby files the *Consumer Advocate's Reply Brief* in the above-styled matter.

INTRODUCTION

In their initial briefs filed in this matter, United Telephone-Southeast, Inc. ("Sprint-United") and BellSouth Telecommunications, Inc. ("BellSouth") raise several points to which the Consumer Advocate desires to respond. Therefore, in accordance with the briefing schedule established by the TRA, the Consumer Advocate files the following reply.

REPLY

There Is No Authority to Support the Incumbent LECs' Argument that Telecommunications Services Do Not Have to Be Resold If Such Services Are Bundled with Deregulated Non-Telecommunications Services.

Sprint-United and BellSouth point out that deregulated, non-telecommunications services standing alone, are not subject to the incumbent LECs' resale obligations under the federal

Telecommunications Act of 1996 (the “Act”). *See* 47 U.S.C.A. § 251(c)(4) (2001). From this position, they then request the TRA to take a quantum leap and find that telecommunications services, which are without question subject to the incumbent LECs’ resale obligations, do not have to be resold at their wholesale discount if such services are “bundled” with these deregulated, non-telecommunications services and sold to customers at discounted rates.

In support of their position, the incumbent LECs make arguments that some of the services contained in bundles, such as CPE maintenance, inside wire and wireless, are not telecommunications services. It is not disputed, however, that some of the services contained in the bundled offerings under discussion, such as local exchange and custom calling services, are “telecommunications services” within the meaning of the Act. Thus the deregulated, non-telecommunications services included in the bundle are appropriately defined and have no bearing on whether the undisputed telecommunications services portion of the bundle must be resold. At best, this argument is relevant only to whether the alleged non-telecommunications services portion of the bundle must be resold.

The incumbent LECs also point out that non-telecommunications services are not magically transformed into a “telecommunications service” merely by virtue of being included in a bundle. The Consumer Advocate asserts that this logic runs in both directions. That is, telecommunications services that are included in the bundle are not magically transformed either. They are still telecommunications services; and, pursuant to the provisions of the Act and FCC rules and orders cited in the Consumer Advocate’s initial brief¹, an incumbent LECs must resell its

¹ *See, e.g.*, 47 U.S.C.A. §§ 153(43), 153(46), 251(c)(4), and 252(d)(3) (2001); 47 C.F.R. §§ 51.605 and 51.613 (2003); *Local Competition Order*, FCC 96-325, 1996 WL 452885 at ¶¶ 871, 877, 939, 948-950 (Aug. 8, 1996); *Memorandum Opinion and Order (Arkansas Preemption Order)*, FCC

telecommunication services at wholesale rates, notwithstanding the bundling, packaging, or discounting thereof.

Thus, having no real authority to support their position, the best that the incumbent LECs can do is state, in the negative, that section 251(c)(4) does not require the telecommunications services portion of bundled offerings to be made available for resale at wholesale rates. However, in its initial brief, the Consumer Advocate has referenced and discussed the specific authority that does require the resale of these services at wholesale rates under the circumstances presented in this case. Accordingly, unlike the Consumer Advocate, the incumbent LECs have referenced no law that buttresses their position in this docket.

The Federal System of Resale Described in the Consumer Advocate's Initial Brief Will Assure That Competitive Discounted Bundles of Services Will Be Offered to Consumers in the Widest Possible Manner.

As for the policy aspect of this case, the Consumer Advocate does not oppose the delivery of bundled services to consumers at discounted rates. In fact, the Consumer Advocate agrees that such offerings should not be unique to incumbent LECs² and should be encouraged by all market participants. As explained in the Consumer Advocate's initial brief, in order for resellers to be in a position to offer competitive discounted bundles of services, the telecommunications services portion of such bundles must be offered for resale at the wholesale discount off the promotional rate of these services.

99-386, 1999 WL 1244073 at ¶¶ 47-48 (Dec. 23, 1999).

² What is unique to incumbent LECs, however, is their duty to offer telecommunications services for resale at wholesale rates. *See* 47 U.S.C.A. § 251(c)(4) (2001). That is, non-LECs are not subject to the resale rules.

Requiring resellers to purchase the telecommunications services portion of bundled service offerings at the general tariff rate, as proposed by Sprint-United and BellSouth, effectively shuts these market participants out of any chance to compete for the business of customers that purchase bundles of discounted services. This is so because the gross profit margin on the resale of such bundles is either nonexistent or too slim for the reseller to operate in the bundled segment of the market.³

At the outset, the FCC recognized the anti-competitive results that logically flow from such disincentives and took steps to eliminate them by specifically finding that section 251(c)(4) does not exempt bundled and discounted service offerings from an incumbent LECs' resale obligations. *See, e.g., Local Competition Order* at ¶¶ 877, 948. This action was necessary to assure that resellers could compete with incumbent LECs on a fair competitive footing for the business of these customers.

BellSouth's Comments Regarding Previous Promotions Are Irrelevant Overstatements.

BellSouth concludes that the resale of promotions have "become the favorite area for complaints by the Consumer Advocate" and that it "has started to raise resale concerns about each new LECs promotion." Lest an uninformed reader take these comments as fact, the Consumer Advocate points out that these overstatements are not supported by any objective review of past events. Of all the promotions filed by all the incumbent LECs operating in this State over the course of this entire year, the Consumer Advocate has sought to intervene in exactly four (4) — the

³ See Consumer Advocate's initial brief at pp. 8-10. The Consumer Advocate is confident that an evidentiary hearing on this matter will support the assertions made in this regard.

Welcoming Reward promotion that BellSouth references and the three promotions that deal with the issues that are presently under discussion in this proceeding (Docket No. 03-00442 - Sprint United's Safe and Sound II Solution tariff; Docket No. 03-00512 - BellSouth's Integrated Solutions tariff; and Docket No. 03-00554 - BellSouth's Wireless Answers tariff).

With regard to BellSouth's specific comments about the Welcoming Reward promotion, the Consumer Advocate would first point out that that case did not address, in any form or fashion, the issue of whether a telecommunications service that is bundled with other services must be resold at the wholesale discount off the promotional rate. Therefore, the Welcoming Reward case is irrelevant to this proceeding.

Secondly, it comes as no surprise to the Consumer Advocate that BellSouth would receive **"exactly zero ("0.00") requests . . . [z]ero requests . . . [n]o resale requests - at all"** of a Welcoming Reward promotion if it imposed unreasonable conditions and limitations on the resale thereof. (Quotation from BellSouth Brief at page 5 (emphasis in original)). Additionally, if it is BellSouth's position that resale is of no real consequence, then the Consumer Advocate fails to see the harm to BellSouth in an allegedly "broad interpretation" of the resale provisions of the Act. BellSouth cannot at once claim that resale is unlikely to occur and then argue that the resale provisions set forth by the FCC and advocated by the Consumer Advocate will somehow ruin BellSouth's ability to do business in Tennessee.

And finally, the notion that resale may be little used by competitors as a mode of entry into local markets is no reason to favor the imposition of restrictions and limitations that are not contemplated by the Act or the FCC. Federal law establishes a system of resale as one possible avenue to open local markets to competition. It does so by imposing resale duties on incumbent LECs, and nothing in this body of law affects those duties one way or another depending on the

actual usage of resale. So, this is but another irrelevant point raised by BellSouth.

Moreover, the final chapter on the federal Act has not been written. Still at issue today, through the *Triennial Review Order* proceeding and elsewhere, is the processes by which competitors will have access to local markets in the future. It makes no sense to unduly restrict the availability of resale today when the competitive landscape is so uncertain.


CONCLUSION

The extent of the legal analysis put forward by Sprint-United and BellSouth in this case is that section 251(c)(4) does not require the resale of telecommunications services at wholesale rates if such services are bundled with non-telecommunications services. They offer nothing in support of this legal conclusion. Moreover, their position is contrary to the open resale mandate required by the Act and interpreted by the FCC in its rules and orders.

Accordingly, this proceeding should move forward to address the particular resale procedures that should be employed for Sprint-United's Safe and Sound II Solution tariff and other similar promotional offerings of incumbent LECs.

RESPECTFULLY SUBMITTED,

PAUL G. SUMMERS, B.P.R. #6285
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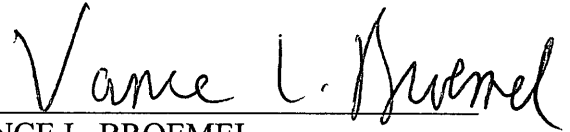
Dated: October 27, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. mail, postage prepaid, or facsimile on October 27, 2003, upon:

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